



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

February 27, 2015
OM 15-02

Mr. John Marion

Re: **Common Cause v. Board of Elections**

Dear Mr. Marion:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Board of Elections (“Board”) is complete. You allege the Board violated the OMA when its March 11, 2013 agenda did not provide a sufficient “statement specifying the nature of the business to be discussed.” R.I. Gen. Laws § 42-46-6(b).

Specifically, you contend that the Board’s March 11, 2013 agenda “was too vague because it did not include bill numbers, or sufficient descriptions, for the legislation that was discussed during the meeting.” Your complaint continued that:

“Common Cause Rhode Island closely tracks all legislation related to elections that is before the Rhode Island General Assembly. We also regularly attend Board of Elections meetings, and I attended and testified [at] the meeting in question on behalf of the organization, as can be seen in the attached minutes.

Having attended the meeting I can attest that there was confusion among members of the Board of Elections as well as the public concerning what legislation was being discussed, and what bills were introduced at the request of the Board’s staff.”

Because your complaint concerned the lack of notice – and since your complaint acknowledged that you attended the Board’s March 11, 2013 meeting and testified at this meeting – this Department requested that you provide evidence that you were aggrieved by the alleged notice violation, as required by Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215, 222 (R.I. 2002). In the same email, this Department also

requested that you indicate why this Department's finding in Block v. Board of Elections, OM 13-25 should not control in this case.

You responded to this Department's inquiry and related:

"[y]ou ask why your Department's finding in Block v. Board of Elections, OM 13-25 should not control in my case. As you state in your response to Mr. Block, he received copies of the legislation discussed at the March 11, 2013 meeting in advance via direct communications with the Board staff. I received no such advance copies. Therefore I did not receive sufficient notice of what specific legislation was to be discussed at the March 11 meeting.

Your second question asks for evidence of how I was aggrieved by the lack of notice. I have reviewed Graziano v. Rhode Island State Lottery Comm'n, 810 A.2d 215, 222 (R.I. 2002) and do believe that although I attended the March 11 meeting, I still meet the standard for being aggrieved. Graziano reads in part: 'While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue...' I believe the failure to 'include bill numbers, or sufficient descriptions,' as I state in my complaint, affected my ability to prepare for, follow the proceedings and respond adequately. When a public body is discussing specific legislation, providing bill numbers is the only way to ensure the public can prepare for meaningful observation and participation in those discussions. I will demonstrate this in two ways.

First, my ability to weigh in during the public comment was materially affected. I prepared to testify at the meeting on bills I thought were on the March 11 agenda as part of the Board's legislative agenda. When I attended the actual meeting at least one of the bills seemingly listed on the agenda was disowned by the Board's staff. On September 24, 2013 I reviewed the entire audio of the March 11 meeting at the Board offices. At approximately 11:50 on the first side of the audio tape Board legal counsel Mr. Marcaccio states of one piece of legislation under discussion, it was 'Not submitted by the Board staff' to the [General] Assembly. Commissioner Farmer then asked, 'Why is it in our name?' Executive Director Kando responded, 'This is what came out of the drafting process' at the [General] Assembly.

Second, as a member of the audience the lack of bill numbers made it almost impossible to follow the deliberations of the Board. The only time the descriptions provided on the agenda were used was when Board Chair Rego announced the second item on the agenda (at approximately 2:00 minutes on the first side of the tape). At no time in the more than hour

long deliberation and discussion that followed did any member of the Board, its staff, or its legal counsel refer to the legislation by the descriptions provided on the agenda. My review of the meeting tape indicates that at least four motions were made and passed by the Board in which the only description of the bill in the motion was the bill number (at approximately 5:30, 8:40, 9:50, 10:42 on the first side of the tape).

Furthermore, at numerous points during the meeting there is confusion about what bills are on the agenda, what bills the Board actually submitted to the Assembly, and what bills were even before the Board during the meeting. In just one example of a confusing exchange, at approximately 22:28 on the first side of the tape Chair Rego asks Executive Director Kando, 'Are there any bills we don't have that are up [at the General Assembly], because they [sic] audience just gave us a bill?' Mr. Kando's response was that he 'can't say for sure.' The Board and staff could not follow the agenda, let alone members of the public."

In response to your complaint, we received a substantive response by the Board's legal counsel, Raymond A. Marcaccio, Esquire. Similar to Block, OM 13-25, Mr. Marcaccio submits that you are not aggrieved as required by Graziano. At this Department's request, the Board provided an audio recording of its March 11, 2013 meeting, which we have reviewed. You did not file a reply.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Board violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The OMA provides a number of requirements to ensure that public meetings are open and accessible to the public. To enforce these provisions, the OMA provides that "[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general." R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Rhode Island Supreme Court examined the "aggrieved" provision of the OMA.

In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission's March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. Similar to the matter at hand, at the Lottery Commission's March 25, 1996 meeting, Mr. Hawkins, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission's notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was "unnecessary" to address the merits of the OMA lawsuit

because “the plaintiffs Graziano and Hawkins have no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Id. at 221-22.

Here, it is undisputed that you attended the Board’s March 11, 2013 meeting, and in fact, testified before the Board concerning proposed election-related legislation. Despite the foregoing, you assert that you fall within Graziano’s advisement that “attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue[s].” Id. Indeed, your correspondence related that you “believe the failure to ‘include bill numbers, or sufficient descriptions’ * * * affected [your] ability to prepare for, follow the proceedings and respond accordingly.” For the reasons explored below, we conclude that you are not aggrieved by the Board’s March 11, 2013 agenda, as required by Graziano.

First, we address your contention that Block, OM 13-25, is distinguishable from the instant matter because the complainant in Block “received copies of the legislation discussed at the March 11, 2013 meeting in advance,” while you “received no such advance copies.” While we take no issue with the factual accuracy of this statement, this factual distinction is hardly determinative.

Similar to the instant matter – where you challenge the sufficiency of the March 11, 2013 agenda – in Block, OM 13-25, this Department reviewed an OMA complaint that also challenged the sufficiency of the Board’s March 11, 2013 agenda. In Block, OM 13-25, this Department determined that consistent with Graziano, the complainant was not aggrieved by the alleged insufficient notice. While this Department no doubt considered that the complainant had obtained from the Board (at his request) actual copies of the legislation to be discussed at the March 11, 2013 meeting (as well as a prior meeting), the receipt of this legislation was only one factor that led to our conclusion that the complainant was not aggrieved. Similar to this case, our focus in Block was on Graziano.

For instance, after concluding that the complainant in Block, OM 13-25, was not “aggrieved” by the inadequate notice allegation, we explained that “[c]hief among our reasons for this conclusion is that on February 26, 2013, the Board emailed [the complainant] – upon [his] inquiry – pdf copies of the ten (10) bills to be discussed during

its February 27, 2013 meeting, as well as the undisputed fact that [the complainant] attended the March 11, 2013 meeting.” Block, OM 13-25, p. 4 (emphasis added). Even more to the point that the factual distinction you raise is not determinative, we continued in Block that “even independent of the Board’s February 26, 2013 email, [the] complaint contains no evidence that [the complainant was] ‘aggrieved,’ ‘disadvantaged,’ or that [he] was unaware of the legislation to be discussed during the March 11, 2013 meeting.” Id. Later in this Department’s finding, we continued that “even if we were to focus solely on the March 11, 2013 meeting and ignore all prior events, we would be left with a situation no different than Graziano, i.e., a person who complains about the sufficiency of notice, but nonetheless attends the meeting and provides no evidence of any particular detriment or injury.” Id. at 5. (Emphasis added).

Accordingly, while the evidence suggests that you never obtained from the Board copies of the legislation to be discussed, considering your attendance – and even testimony before the Board – we are still “left with a situation no different than Graziano, i.e., a person who complains about the sufficiency of notice, but nonetheless attends the meeting.” Id. Of course, similar to Block, OM 13-25, our focus must now turn to whether you provide “evidence of any particular detriment or injury” to fall within the “exception” to Graziano. See Graziano, 810 A.2d at 222 (“attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue”). As the Supreme Court has explained, “[t]he burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Id.

In support of your complaint, you have submitted two (2) correspondences. You relate that you “attended and testified [at] the meeting in question.” Your letter continues that “[h]aving attended the meeting [you] can attest that there was confusion among members of the Board of Elections as well as the public concerning what legislation was being discussed, and what bills were introduced at the request of the Board’s staff.” We have little trouble concluding that this statement is insufficient to establish that you were “in some way disadvantage or aggrieved by [an alleged] defect” in the notice. Id.

Read literally, the above statement falls short of alleging that you were somehow aggrieved and is limited to your assertion that members of the Board and the public were confused. It is quite apparent that you lack standing to raise the Board’s alleged confusion. Even if we were to read your complaint in such a manner to substitute “you” for the “public,” your complaint falls short of the allegation raised and discussed in Block, OM 13-25, where the complainant alleged that due to the March 11, 2013 agenda his “right to understand both the deliberations and decisions of the Board was violated.” With respect to this assertion, we explained in Block, OM 13-25, that the complainant’s:

“statement falls far short of the burden articulated in Graziano. Indeed, this statement provides no detail or insight (or supporting evidence) concerning how your right to understand the deliberations and decisions was affected by what you allege was insufficient notice. The above

statement is entirely conclusory * * * and would reduce Graziano into merely a pleading exercise.” Block, OM 13-25, p. 5.

While Block, OM 13-25, concerned the allegation that an inadequate notice affected the complainant’s “right to understand both the deliberations and decisions of the Board,” respectfully, a careful reading of your complaint fails to allege that you sustained any injury as a result of the allegedly deficient public notice. The fact that your complaint relates that “there was confusion among members of the Board of Elections as well as the public concerning what legislation was being discussed, and what bills were introduced at the request of the Board’s staff” supports our conclusion and provides no evidence that any injury was the result of a deficient notice. The failure to demonstrate that you sustained an injury and that this injury was the result of the alleged defective notice is fatal to your claim.

After this Department received your complaint this Department responded by email and, as discussed above, sought evidence from you concerning how you were aggrieved by the alleged lack of notice. You responded and averred that:

“[w]hen a public body is discussing specific legislation, providing bill numbers is the only way to ensure the public can prepare for meaningful observation and participation in those discussions. I will demonstrate this in two ways.”¹

The first way you attempt to demonstrate that you were aggrieved is by asserting that your “ability to weigh in during the public comment was materially affected.” In support of this position, you relate that you:

“prepared to testify at the meeting on bills [you] thought were on the March 11 agenda as part of the Board’s legislative agenda. When [you] attended the actual meeting at least one of the bills seemingly listed on the agenda was disowned by the Board’s staff. On September 24, 2013 I reviewed the entire audio of the March 11 meeting at the Board offices [sic]. At approximately 11:50 on the first side of the audio tape Board legal counsel Mr. Marcaccio states of one piece of legislation under discussion, it was ‘Not submitted by the Board staff’ to the [General] Assembly. Commissioner Farmer then asked, ‘Why is it in our name?’ Executive Director Kando responded, ‘This is what came out of the drafting process’ at the [General] Assembly.”

¹ Your complaint seems to contradict the statement that “providing bill numbers is the only way to ensure the public can prepare for meaningful observation and participation in those discussions.” Specifically, your complaint relates that “we believe the agenda for the March 11, 2013 [meeting] of the Board was too vague because it did not include bill numbers, or sufficient descriptions, for the legislation that was discussed during the meeting.” (Emphasis added).

Here, you do not expressly indicate how you were aggrieved when the Board “disowned” one of the bills, which you had prepared to testify on, and which was “under discussion” by the Board at its March 11, 2013 meeting. Respectfully, the failure to sufficiently explain how you were aggrieved, by itself, provides an adequate basis to reject this claim. See Graziano, 810 A.2d at 222 (“The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.”). Even more important, however, your correspondence demonstrates that you were not aggrieved by this allegation. In particular, you relate that as a result of the March 11, 2013 agenda, you “prepared to testify at the meeting on bills [you] thought were on the March 11 agenda as part of the Board’s legislative agenda.” In a situation where a person complains about the sufficiency of notice “[i]t is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect.” Id.

As explained above, it is unclear to this Department how you were aggrieved when the Board “disowned” one of the bills that you had prepared to testify on, but what is clear is that based upon the March 11, 2013 notice, you prepared to testify concerning specific legislation, the Board discussed this legislation during its March 11, 2013 meeting, and you testified concerning legislation, which you “thought w[as] on the March 11 agenda.” Based upon these circumstances it is simply difficult to conclude that you were “aggrieved” by the March 11, 2013 agenda. See R.I. Gen. Laws § 42-46-6(b)(requiring a “statement specifying the nature of the business to be discussed”). Indeed, considering you had prepared to testify concerning legislation, which was actually discussed during the Board’s March 11, 2013 meeting, your correspondence suggests that you were not aggrieved. In this respect, we have been presented with no evidence (or even an assertion) that the subject matter of your testimony was hindered or otherwise affected by the Board’s notice. See Graziano, 810 A.2d at 222 (“attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue”).²

The second manner in which you allege you were aggrieved is that you contend “as a member of the audience the lack of bill numbers made it almost impossible to follow the deliberations of the Board.” In support of this allegation you relate that “[a]t no time in the more than hour long deliberation and discussion that followed did any member of the Board, its staff, or its legal counsel refer to the legislation by the descriptions provided on the agenda.”

With respect to this allegation, we begin by observing that your averment that the lack of bill numbers “made it almost impossible to follow the deliberations of the Board,” is entirely conclusory and you provide no evidence (or even argument) to amplify upon this allegation or explain how you were aggrieved. Indeed, if we were to find that this

² Our review of the audio tape reveals that the Board expressly sought public comment on this legislation from anyone who supported the bill prior to voting to “disown[]” the legislation. No audience member sought to express support.

statement satisfied Graziano, we would reduce Graziano to nothing more than an exercise in pleading and Graziano rejects this interpretation. See Block, OM 13-25.

Arguably more to the point, this averment as well as your entire complaint demonstrate that you were not aggrieved by the alleged lack of notice. As best as we can tell, the only occasion where you raise the issue of the Board's March 11, 2013 notice and its effect upon you was when you indicate that based upon the Board's posted agenda you "prepared to testify at the meeting on bills [you] thought were on the * * * Board's legislative agenda." For the reasons already discussed, rather than support your position that you were aggrieved as a result of the Board's agenda, these statements tend to demonstrate that you were not aggrieved by the alleged lack of notice and that the true focus of your complaint is not the Board's agenda, but other issues that arose during the March 11, 2013 meeting. Other portions of your complaint support this conclusion.

For instance, with respect to your second statement in support of your complaint, you focus not on the allegedly defective notice, but instead on the Board's deliberations. You indicate that "[t]he only time the descriptions provided on the agenda were used [during the March 11, 2013 meeting] was when Board Chair Rego announced the second item on the agenda" and that "[a]t no time in the more than hour long deliberation and discussion that followed did any member of the Board, its staff, or its legal counsel refer to the legislation by the descriptions provided on the agenda."³ This seems to suggest that the Board's agenda was not insufficient, at least according to you, and the real focus of your complaint is not the Board's agenda, but the nature of the Board's discussion. At the very least, the fact that you contend that during the meeting, the Board did not "refer to the legislation by the descriptions provided on the agenda," supports our conclusion that your allegations of injury are not based upon an allegedly defective notice, but instead based upon other issues that arose during the March 11, 2013 meeting.

An additional example concerns your averment that "at numerous points during the meeting there [was] confusion about what bills [were] on the agenda, what bills the Board actually submitted to the [General] Assembly, and what bills were even before the Board during the meeting." These allegations contain no information that any "confusion" was the result of an allegedly defective agenda and our review of the Board's audio recordings seems to suggest that any "confusion" was independent of the Board's agenda. In one situation, Board members appear to express "confusion," but the result of this "confusion" had nothing to do with the allegedly defective notice, but instead was apparently the product of the bills being listed in the Board members' packets in a different order than certain Board members anticipated.

Lastly, we would be remiss if we did not mention what you have already acknowledged – that you provided oral testimony at the Board's March 11, 2013 meeting. The audio recording also evinces that prior to the Board's March 11, 2013 meeting, you provided

³ The OMA does not govern the Board's staff or the Board's legal counsel. See R.I. Gen. Laws § 42-46-2(3)(definition of public body).

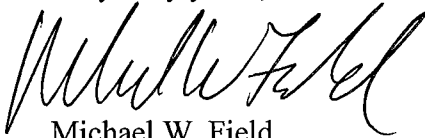
written testimony. At no point during your oral testimony did you suggest that the Board's agenda was insufficient nor did you indicate that your testimony was hampered by the "lack of preparation or ability to respond to the issue." See Graziano, 810 A.2d at 222. Rather, your testimony concerned legislation that the Board had discussed at this meeting, responded to comments made by the Board's legal counsel, and expressed appreciation to the Board for its deliberation on certain proposed legislative items and for holding public comment.

While this Department remains steadfast in its enforcement of the OMA, we also remain mindful that this Department's role is not to substitute its independent judgment, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. On this note, the General Assembly has provided that "[a]ny citizen or entity of the state who is aggrieved as a result of violations" of the OMA may file a complaint, see R.I. Gen. Laws § 42-46-8, and the Supreme Court has interpreted this provision as discussed above. Because your complaint contains no evidence to demonstrate that you were aggrieved by the alleged insufficient public notice, consistent with Graziano, we must conclude that you do not have standing to raise this issue.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. R.I. Gen. Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter.

Thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael W. Field", written in a cursive style.

Michael W. Field
Assistant Attorney General

cc: Raymond A. Marcaccio, Esquire